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## **EU Privacy and Internal Investigations**

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- **Corporate compliance obligations increasingly lead to internal investigations which require organizations to review data held on corporate IT systems and mobile devices used by employees. Investigations create a tension between the organization's compliance obligations and the individual's rights under data protection law.**
- **The panel will explore:**
  - **different approaches to the employees' expectations of privacy;**
  - **the challenges of distinguishing corporate from personal, as employees increasingly use their own devices or apps for work;**
  - **the scoping of searches and use of software tools to ensure all is lawful; and**
  - **what are the risk for organizations getting it wrong.**

# An expectation of Privacy?

- The growth of remote working, always on devices and the proliferation of BYOD means the division of work and personal data is increasingly hard to distinguish.
  
- **Do employees have a general expectation of privacy?**
  - Will depend on jurisdiction – i.e., greater expectation in Germany than UK.
  - Effective use of corporate policies?
    - Employee handbook; and
    - Acceptable Use etc.

# Beginning an investigation

- **Important to consider GDPR at outset of investigation**
  - **Transparency**
    - What have employees been told about investigation and when?
    - What interactions have there been with works council?
  - **Securing data**
    - How is personal and corporate delineated?
    - How is data collected and secured for the investigation?
    - When is data secured, especially mobile devices and portables that are not on-premise, as employees may speak to each other?
    - What considerations are given to social media accounts or apps that are not corporate issued (WhatsApp/Signal etc.)?

# Let the searches commence!

- **Once data is secured what searches can and should be done?**
  - Use of tools to assess or set scope or parameters of searches.
  - Use of AI and algorithms to create cluster fields and identify trends is helpful but has risks:
    - automated processing but not decision making?
    - is it profiling or monitoring?
    - Does it create a requirement for DPIA?
- **How does organization ensure compliance of the investigation and compliance with GDPR?**
  - Critical issue is reasonable expectation and balance.

- **Impact on the investigation**
  - Undermine the investigation or ability to use reports for intended purpose.
- **Report by data subject to DPA**
  - All DPAs report increasing numbers of data subject complaints.
  - This can lead to delay in investigation, especially where DPA opens its own investigation and requires it to take precedence.
- **Enforcement actions by DPA**
  - DPAs light on guidance ( Privacy v employment law).
  - DPAs very focused on transparency –
    - investigations are internally controlled so high expectation of compliance, means risk of greater penalty for failure.

- Preparation is the key – GDPR and national employment issues are not always aligned especially cross-border.
- At outset – think broadly about scope and process (NB timing of actions to protect integrity of investigation).
- Particular attention on BYOD and non corporate apps and accounts – here transparency is critical.
- Where necessary use PIAs, DPIAs and TIAs to ensure you understand and assess all the risks relating to a scope and technology used in the investigation.
- Context of types of data & size of datasets as well as use-case will be important in assessing risk.
- The use of search tools can create additional considerations to be assessed.
- Beware the mid-investigation DSAR and have process for scoping response.
- Consider privilege where applicable – but it is not a perfect shield.

# Questions + Contact



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